Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States

Mesa Airlines, Inc. and
WestAir Commuter Airlines, Inc.,
Petitioners,

v.

United Airlines, Inc. and SkyWest Airlines, Inc.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Two regional airlines entered into voluntary partnership agreements with a third airline, a major carrier, concerning the providing of regional air service to and from various cities. A fourth airline tortiously interfered with those agreements. The questions presented are:

1. Did the Court of Appeals err in holding that the Airline Deregulation Act of 1978 ("ADA") preempted claims by the two airlines against their partner for: (i) breach of fiduciary duty, and (ii) fraud in the inducement?

2. Did the Court of Appeals err in holding that the ADA preempted a claim by the two airlines against the fourth for tortious interference with contract?

3. Did the Court of Appeals err in refusing to analyze the ADA's preemption provision in a manner consistent with this Court's recent decisions regarding the similar preemption provision in ERISA?

PARTIES TO THE PROCEEDING

All parties to this proceeding appear in the caption of this case. Petitioner Mesa Airlines, Inc. ("Mesa") is a publicly traded corporation. Petitioner WestAir Commuter Airlines, Inc. ("WestAir") is a wholly owned subsidiary of Mesa.

Pursuant to Supreme Court Rules 14.1(b) and 29.6, Petitioners state that "Mesa Air Group" is a publicly held company owning 10% or more of Mesa Airlines' stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 6

I. The Absence Of Any Supreme Court ADA Jurisprudence Since *Wolens* Has Lead To The Outright Split Among The Circuit Courts Explicitly Recognized In The Seventh Circuit's Decision 8

A. Introduction 8

B. The Genesis of the Split: The Post-*Wolens* Changes in This Court's ERISA Jurisprudence 12

II. The Decision Of The Seventh Circuit Is In Conflict With This Court's Decision In *Wolens,* And Places Airline Contracts, As Well As Airline Competition, In Peril 18

CONCLUSION 21

TABLE OF AUTHORITIES

Page(s)

Cases

Abdu-Brisson v. Delta Air Lines, Inc., 128 F.3d 77 (2nd Cir. 1997) 8, 11, 15

American Airlines, Inc. v. Wolens, 513 U.S. 219 (1995) ..... *passim*

Boggs v. Boggs, 520 U.S. 833 (1997) 15

California Div. Of Labor Standards Enforcement v. Dillingham Const., N.A., Inc., 519 U.S. 316 (1997) 11, 14

Charas v. Trans World Airlines, Inc., 160 F.3d 1259 (9th Cir. 1998) (en banc), *reh'g denied*, 169 F.3d 594 (9th Cir. 1999) (en banc) ..... *passim*

De Buono v. NYSA-ILA Medical and Clinical Services Fund, 520 U.S. 806 (1997) 14

Gade v. National Solid Wastes Management Ass'n, 505 U.S. 88 (1992) 16

Gee v. Southwest Airlines, 110 F.3d 1400 (9th Cir. 1997) 16

Harris v. American Airlines, Inc., 55 F.3d 1472 (9th Cir. 1995) 16

In re Air Transp. Excise Tax Litigation, 37 F. Supp. 2d 1133 (D. Minn. 1999) 11

Miree v. DeKalb County, Ga., 433 U.S. 25 (1977) 4

Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992) ..... *passim*

Nader v. Allegheny Airlines, Inc., 426 U.S. 290 (1976) 20

New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995) 13, 14

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 14

Taj Mahal Travel, Inc. v. Delta Airlines, Inc., 164 F.3d 186 (3rd Cir. 1998) ..... *passim*

Travel All Over the World, Inc. v. Kingdom of Saudi Arabia, 73 F.3d 1423 (7th Cir. 1996) 5, 10

United Airlines, Inc. v. Mesa Airlines, Inc., 1999 WL 1144962 (N.D. Ill. Oct. 5, 1999) 2

United Airlines, Inc. v. Mesa Airlines, Inc., 219 F.3d 605 (7th Cir. 2000) 1

Statutes

28 U.S.C. § 1292(b) 5

49 U.S.C. § 40101(a)(6) and (12) 2

49 U.S.C. § 40120(c) 2

49 U.S.C. § 41713(b)(1) 2

49 U.S.C. § 46301(c) 21

Other Authorities

Restatement (Second) of Torts § 768(2) (1977) 21

Miscellaneous

Ann K. Wooster, *Annotation, Construction and Application of § 105 Airline Deregulation Act (49 U.S.C.A. § 41713), Pertaining to Preemption of Authority Over Prices, Routes, and Services*, 149 A.L.R. Fed. 299 (1998) 6

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United Airlines, Inc., and SkyWest Airlines, Inc.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

Petitioners Mesa and WestAir respectfully petition for a writ of certiorari to review the decision of the Seventh Circuit Court of Appeals which held that Petitioners' tort claims were preempted by § 105(a)(1) (recodified in 1994 at § 41713(b)(1)) of the ADA.

OPINIONS BELOW

The opinion of the Seventh Circuit (App. 1a-15a) is reported at *United Airlines, Inc. v. Mesa Airlines, Inc.*, 219 F.3d 605 (7th Cir. 2000). The Opinion of the United States District Court for the Northern District of Illinois, Eastern Division (App. 16a-19a), certifying its August 6, 1999 order for interlocutory appeal under 28 U.S.C. § 1292(b), is reported at *United Airlines, Inc. v.*

Mesa Airlines, Inc., 1999 WL 1144962 (N.D. Ill. Oct. 5, 1999).

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on July 5, 2000. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

1. 49 U.S.C. § 41713(b)(1) (the "preemption clause") of the ADA (as recodified in 1994 and amended) (formerly codified at 49 U.S.C. App. § 1305(a)(1)) states in relevant part:

> Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

2. 49 U.S.C. § 40120(c) (the "savings clause") of the ADA states in relevant part: "A remedy under this part is in addition to any other remedies provided by law."

(Formerly codified at 49 U.S.C. App. § 1506.)

3. 49 U.S.C. § 40101(a)(6) and (12), respectively, state in relevant part:

In carrying out subpart II of this part and those provisions of subpart IV applicable in carrying out subpart II, the Secretary of Transportation shall consider the following matters, among others, as being in the public interest and consistent with public convenience and necessity:

* * *

(6) placing maximum reliance on competitive market forces and on actual and potential competition

* * *

(12) encouraging, developing, and maintaining an air transportation system relying on actual and potential competition—

(A) to provide efficiency, innovation, and low prices; and

(B) to decide on the variety and quality of, and determine prices for, air transportation services.

(Formerly codified at 49 U.S.C. App. §§ 1302(a)(4), 1302(a)(9).)

STATEMENT OF THE CASE

This case arises out of business relations, and business disputes, between airlines. Mesa and WestAir are regional airlines that entered into certain "code-share arrangements," which included partnership agreements with United. These agreements dealt with the providing of regional air service by Mesa and WestAir to numerous small cities and towns, with subsequent connections to United flights at certain "hub" airports.[1]

When the parties to those agreements experienced disagreements and difficulties in their business dealings with one another, this litigation ensued, and was initiated by United's request (filed in the United States District Court, N.D. Illinois, Eastern Division) for a declaratory judgment respecting an interpretation of one of the contracts. Petitioners counterclaimed, seeking damages against United for breach of contract, fraudulent inducement with respect to

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[1] The Seventh Circuit's decision contains (at App. 2a-6a, 219 F.3d at 606-07) a fairly detailed recitation of the substantive facts which chronicle the history of the business dealings and disputes between the parties. For purposes of this writ, Petitioners do not take issue with that recitation, other than to disagree with the Court's comments, in *dicta*, respecting the substantive validity of Petitioners' partnership allegations (App. 12a-13a, 219 F.3d at 610). Those allegations must, at any rate, be taken as true, given that the District Court's decision was made in the context of deciding Respondents' motion for judgment on the pleadings. *See Miree v. DeKalb County, Ga.*, 433 U.S. 25 (1977).

one of those contracts, and breach of the fiduciary duties inherent in the partnership relationship created by those contracts. Petitioners also sued a third party airline, Respondent SkyWest Airlines, Inc. ("SkyWest"), for tortious interference with those contracts.[2]

On August 6, 1999, the District Court granted the motion for judgment on the pleadings filed by Respondents United and SkyWest, and dismissed Petitioners' tort claims, finding that they all related to "routes of a carrier" and thus were "preempted by the ADA." App. 16a, 1999 WL 1144962, at *1. On October 4, 1999, pursuant to Petitioners' motion, the District Court certified its rulings for interlocutory appellate review, stating that the "preemption question is a pure question of law" (*Id.*) and citing as reasons, among other things, that the decision of the Third Circuit in *Taj Mahal Travel, Inc. v. Delta Airlines, Inc.*, 164 F.3d 186 (3rd Cir. 1998) had "recently raised doubts about the Seventh Circuit's conclusion" in *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423 (7th Cir. 1996), with respect to the preemption issue. App. 18a, 1999 WL 1144962, at *1.

Petitioners invoked the jurisdiction of the Seventh Circuit pursuant to 28 U.S.C. § 1292(b),

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[2] The District Court exercised jurisdiction over this action pursuant to 28 U.S.C. § 1332, as there was complete diversity of citizenship between the parties, and the amount in controversy exceeded $75,000, exclusive of interest and costs. The District Court possessed jurisdiction over Petitioners' counterclaims under 28 U.S.C. § 1332 and 28 U.S.C. § 1367(a).

in seeking its review of the District Court's August 6, 1999 Order. On December 16, 1999, the Seventh Circuit granted Petitioners' Petition for Leave to Appeal. In a July 5, 2000 decision authored by Judge Easterbrook, the Seventh Circuit subsequently affirmed the District Court's conclusion that the ADA preempted all of Petitioners' tort claims.

REASONS FOR GRANTING THE WRIT

The Airline Deregulation Act of 1978 represents a landmark piece of legislation that has had profound and far-reaching impact both on the airline industry and the public which it serves. However, the scope and parameters of the ADA, especially with respect to its preemption provision, have remained uncertain and confused, despite an enormous amount of litigation on this issue in the federal courts.[3]

This case concerns that uncertain scope of ADA preemption; the context being a business dispute between partners: namely, a major airline (United), and two regional air carriers (Mesa and WestAir). The providing of regional airline service is a critical component of the commercial air system—extending the cross-country network of interconnecting flights to

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[3] *See* Ann K. Wooster, *Annotation, Construction and Application of § 105 Airline Deregulation Act (49 U.S.C.A. § 41713), Pertaining to Preemption of Authority Over Prices, Routes, and Services*, 149 A.L.R. Fed. 299 (1998), for a compilation of such cases.

smaller cities which the major airlines (with their large jets) are often unable or unwilling to serve.

However, the Seventh Circuit's strict adherence to a "linguistic" analysis of the ADA's preemption provision—in a sharp split from the broader and more soundly-based "purpose and scope" analysis adopted by several other circuits—has resulted in a decision which is directly contrary to the "pro-competition" policies underlying the ADA, as well as the attendant "pro-contract" policies which have been emphasized by this Court. By refusing to allow Petitioners' breach of fiduciary duty claim, the Seventh Circuit has now effectively ruled that airlines, although they may be free to otherwise come to private agreements with each other, may not agree to be *partners* with one another, insofar as the *sine qua non* of such a relationship—the reciprocal fiduciary duties of the partners—will not be enforced in a court of law, because such duties allegedly implicate "rules external to the parties' bargain . . . ." App. 12a, 219 F.3d at 610.

In this era of mergers, code-share agreements and other alliances between and among air carriers, such a ruling will have a profound effect, not only on regional carriers and the essential services which they provide, but on the entire industry. Moreover, the marketplace has never operated in an environment devoid of common law constraints. Yet, by refusing to allow Petitioners' fraudulent inducement and tortious interference with contract claims, the Seventh Circuit has endorsed a manner of

unfettered and ungoverned competition which is as unprecedented as it is inappropriate.

I. The Absence Of Any Supreme Court ADA Jurisprudence Since *Wolens* Has Lead To The Outright Split Among The Circuit Courts Explicitly Recognized In The Seventh Circuit's Decision

A. Introduction

This Court has had only two occasions—its 1992 decision in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), and its 1995 decision in *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995)—to construe the extent and dimension of ADA preemption. In both of those decisions, the Court looked to its then-existing ERISA jurisprudence for guidance. However, that jurisprudence has since undergone substantial re-thinking and modification.

The question then becomes whether the corresponding ADA preemption analysis should now similarly reflect this new approach. Several circuits, including the Second[4], the Third[5], and the Ninth[6], have all held that the preemption provision should indeed be construed in light of

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[4] *See Abdu-Brisson v. Delta Air Lines, Inc.*, 128 F.3d 77 (2nd Cir. 1997).

[5] *See Taj Mahal Travel, Inc. v. Delta Airlines, Inc.*, 164 F.3d 186 (3rd Cir. 1998).

[6] *See Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259 (9th Cir. 1998) (en banc), *reh'g denied*, 169 F.3d 594, 595 (9th Cir. 1999) (en banc).

the ADA's overall "structure and purpose" (in accordance with this Court's recent ERISA preemption analysis), as opposed to the more rigid "linguistic analysis" employed in *Morales*, *Wolens*, and the Court's then-existing ERISA jurisprudence.

The Seventh Circuit, in the case at bar, has now explicitly split from the Second, Third and Ninth Circuits on this issue, stating that:

> Opinions such as [the Third Circuit Decision in] *Taj Mahal* [cite omitted] . . . cannot be reconciled with *Wolens* . . . and we doubt that this position can be justified by the latest ERISA cases, even if we were free (which we are not) to prefer [such] decisions . . . over *Wolens* and *Morales*.

App. 8a, 219 F.3d at 608-09.

Finding that its "marching orders are clear," the Seventh Circuit accordingly stated that "if developments in pension law have undercut holdings in air-transportation law, *it is for the Supreme Court itself to make the adjustment,*" *(Id.*, App. 7a, 219 F.3d at 608*)* adding: "[N]*othing any other circuit has said about the subject persuades us to alter course.*" App. 9a, 219 F.3d at 609 (emphasis added).

The split among the circuits on this vitally important issue of ADA preemption is fundamental in scope, and not merely cosmetic in nature. The Seventh Circuit's decision makes

scarcely little attempt to reconcile the dismissal of Petitioners' tort claims with an analysis demonstrating that the prosecution of those claims would defeat or frustrate the overall purposes of the ADA. Clearly, had Petitioners litigated these same issues in the Second, Third or Ninth Circuits, their tort claims would have indeed survived preemption. Thus, the existing split in the circuits respecting which fundamental line of ADA preemption analysis to follow has now ironically created the very manner of uncertainty and disparate results that the ADA was designed, in part, to eliminate.[7]

The Second Circuit has described the problem as follows:

> The "related to" language of the ADA provides neither a predictable nor practical formula for distinguishing preempted from non-preempted state and local laws, and the Supreme Court has provided little guidance as to the meaning of "related to" after *Morales* and *Wolens*.

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[7] Another illustration of this confusion and uncertainty—made pertinent in light of Petitioners' claims for punitive damages in these proceedings—is the Third Circuit's split with the Seventh on the issue of whether the ADA preempts such claims. *See Taj Majal*, 164 F.3d at 195, in which the Third Circuit, in allowing the plaintiff to pursue a claim for punitive damages, stated that it was "not persuaded by [the] reasoning" of the Seventh Circuit in *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia* on this issue.

Abdu-Brisson v. Delta Air Lines, Inc., 128 F.3d 77, 82 (1997). The Second Circuit concluded, in a somewhat apologetic tone, as follows:

> In his concurring opinion in *Dillingham Construction*, Justice Scalia labeled the ERISA preemption clause an "illusory test," a description which also fits the similar ADA preemption clause. [cite omitted] We appreciate the difficulties for all parties, including the district court, but we can offer no bright line relief.

Id. at 85. Similar sentiment has been expressed in the Third Circuit in *Taj Mahal*, 164 F.3d at 192-94.[8]

> In the absence of definitive guidance from the Supreme Court, the Courts of Appeals have struggled with the relationship between the [ADA's] preemption clause and state tort claims. The rulings have not been consistent, as a review of post-*Morales* appellate case law reveals.
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[8] *See also, Charas*, 160 F.3d at 1263 ("[T]he scope of this [ADA] preemption has been a source of considerable dispute since its enactment."), and *In re Air Transp. Excise Tax Litigation*, 37 F. Supp. 2d 1133, 1139 (D. Minn. 1999) ("[T]he Eighth Circuit has not yet had occasion to apply or expound on the Supreme Court's holding in *Wolens*, but other circuits have since struggled to draw the line that separates allowable state law claims from ADA-preempted ones.").

> As is apparent from these cases, attempts to resolve the issue of preemption in tort causes of action have been hampered by the ambiguous preemption terminology. The Supreme Court's efforts to arrive at a practical interpretation in *Morales* and *Wolens* have not resolved questions arising in the tort field.

In light of the foregoing, Petitioners respectfully submit that this Court should accept the Seventh Circuit's implicit invitation in the case at bar, and grant Petitioners' writ, so as to provide the much-needed guidance respecting the proper analysis and scope of the ADA's preemption provision. This issue has, since *Wolens*, well percolated throughout the federal courts, and the circuits are now indeed at a loggerhead[9], with the only consensus seemingly being that further guidance and direction from this Court would be salutary.

B. The Genesis of the Split: The Post-*Wolens* Changes in This Court's ERISA Jurisprudence

The split between the circuits as to which line of ERISA analysis should be applied to the

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[9] Indeed, in addition to the split created by the Seventh Circuit in the case at bar, the Ninth Circuit has also expressly rejected the ADA preemption analysis and approach of the Fifth Circuit—which has adopted an "operations-versus-service dichotomy"—calling such an approach "folly," and stating that it "invites nonsensical, inequitable, and inconsistent results . . . ." *Charas*, 160 F.3d at 1263.

ADA had its beginnings in the *Morales* decision, in which this Court, in attempting to analyze what Congress meant when it forbade states from enacting or enforcing laws, regulations or provisions "related to" a price, route, or service of an air carrier (*see* 49 U.S.C. § 41713(b)(1)), looked to similar "related to" language in ERISA's preemption clause, and adopted the same standard. At the time of *Morales*, the Court had been giving ERISA preemption an exceedingly broad scope, holding that the "breadth of [that provision's] preemptive reach is apparent from [its] language; that it has a broad scope, and an expansive sweep, and that it is broadly worded, deliberately expansive, and conspicuous for its breadth." *Morales*, 504 U.S. at 384 (internal cites and quotes omitted). Justice Scalia concluded, "[s]ince the relevant language of the ADA is identical, we think it appropriate to adopt the same standard here . . . ." *Id.* In *Wolens*, decided on January 18, 1995, this Court cited to and relied upon that same ERISA jurisprudence. 513 U.S. at 223.

However, as the fates would have it, on the very same day that *Wolens* was decided, this Court heard argument on an ERISA preemption issue in the case of *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995). In *Travelers*, a unanimous Court retreated from its strictly textual analysis of ERISA's preemption provision (i.e., the "related to" language), stating that "[i]f 'relate to' were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes preemption would never run its course,

for '[r]eally, universally, relations stop nowhere.'" 514 U.S. at 655 (citations omitted). Justice Souter concluded, "[W]e have to recognize that our prior attempt to construe the phrase 'relate to' does not give us much help in drawing the line here," adding that the analysis "must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." *Id.*[10]

The analytical trend by this Court away from attempting to parse the literal words of the ERISA preemption clause has continued with such cases as *California Div. Of Labor Standards Enforcement v. Dillingham Const., N.A., Inc.*, 519 U.S. 316, 335 (1997), in which Justice Scalia, in his concurring opinion, admonished the Court for not acknowledging that the earlier ERISA cases attempting to interpret and give effect to the plain language of the ERISA preemption provision "have in effect been abandoned." Similarly, in *De Buono v. NYSA-ILA Medical and Clinical Services Fund*, 520 U.S. 806, 815 (1997), Justice Stevens, for the majority, again focused on the intent of the law, rather than its literal language, and

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[10] In so concluding, *Travelers* found that the "related to" language of ERISA did not modify the "starting presumption" that Congress did not intend to supplant state law. 514 U.S. at 654. The Court therefore predicated its analysis on the assumption that "the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* at 655 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

found that the state law at issue was not preempted because it was only "one of 'myriad state laws' of general applicability that impose some burdens on the administration of ERISA plans but nevertheless do not 'relate to' them within the meaning of the governing statute."

The clear direction of this Court has thus been to limit the reach of ERISA's preemption clause to those state laws that actually interfere with the purpose of the federal statute. *See also Boggs v. Boggs*, 520 U.S. 833, 841 (1997), in which Justice Kennedy held: "We can begin, and in this case end, the analysis by simply asking if state law conflicts with the provisions of ERISA or operates to frustrate its objects."

Predicated in large part upon their acknowledgement of the severe practical limitations inherent in any attempt to give meaning to the literal language of the "related to" provision in the ADA preemption clause, and coupled with the recognition of this Court's virtual abandonment of that effort in its recent ERISA jurisprudence, the Second Circuit (in *Abdu-Brisson, supra*), the Third Circuit (in *Taj Mahal, supra*), and the Ninth Circuit (in *Charas, supra*) have all similarly moved to an "ADA preemption test" which focuses on the purposes and policies of the ADA, rather than on the literal language of its preemption clause.

In *Abdu-Brisson*, the Second Circuit, relying upon this Court's post-*Shaw* ERISA jurisprudence, and citing to this Court's opinion in *Gade v. National Solid Wastes Management*

Ass'n, 505 U.S. 88, 98 (1992), found that the proper analysis respecting ADA preemption (indeed, any preemption case) was "to determine whether state regulation is consistent with the structure and purpose of the statute as a whole." 128 F.3d at 83. Citing *Morales*, the Second Circuit accordingly found that the "structure and purpose" of the ADA "was based on a Congressional assumption that 'maximum reliance on competitive market forces' would best further 'efficiency, innovation, and low prices' as well as 'variety [and] quality . . . of air transportation services' . . . ." *Id.* at 84 (citing *Morales*, 504 U.S. at 378).

In *Charas*, the Ninth Circuit, *sua sponte*, sat *en banc* "to rethink [its] previous decisions" regarding "the circumstances under which the . . . [ADA] preempts certain state law claims." 160 F.3d at 1261. In holding that "in enacting the ADA, Congress intended to preempt only state laws and lawsuits that would adversely affect the economic deregulation of the airlines and the forces of competition within the airline industry," the Ninth Circuit expressly overruled its earlier decisions in *Harris v. American Airlines, Inc.*, 55 F.3d 1472 (9th Cir. 1995) and *Gee v. Southwest Airlines*, 110 F.3d 1400 (9th Cir. 1997). *Id.* at 1261. Notably, the court found that the ADA's "savings clause," read together with the preemption clause, operates to "evidence congressional intent to prohibit states from regulating the airlines *while preserving state tort remedies that already existed at common law, provided that such remedies do not significantly*

impact federal deregulation." *Id.* at 1265. (Emphasis added.)

The Third Circuit, citing *Charas*, has similarly held that the test of ADA preemption is *"whether a common law tort remedy frustrates deregulation by interfering with competition through public utility-style regulation."* *Taj Mahal*, 164 F.3d at 194 (emphasis added). In so concluding, the court reasoned that "[w]hen state law does not have *a regulatory effect*, it is 'too tenuous, remote, or peripheral' to be preempted." *Id.* (emphasis added) (citing *Morales*, 504 U.S. at 390). The court further noted that just as the Department of Transportation "has neither the authority nor the apparatus required to superintend contract disputes" (quoting *Wolens*, 513 U.S. at 232), "[t]hat observation applies equally to tort disputes." *Id.*

It is these decisions of the Second, Third and Ninth Circuits, relying as they do upon the line of ERISA cases decided subsequent to *Wolens*, at which the Seventh Circuit and Judge Easterbrook have now taken square aim, in holding that such a change in analytical framework would necessitate an implicit overruling of *Morales* and *Wolens*. The Second, Third and Ninth Circuits apparently feel otherwise; nevertheless, one thing is clear: there is a split, as well as much confusion in the circuits, and the issue of ADA preemption is, by any measure, ripe and ready for further Supreme Court guidance and direction.

II. The Decision Of The Seventh Circuit Is In Conflict With This Court's Decision In *Wolens*, And Places Airline Contracts, As Well As Airline Competition, In Peril

In finding that the ADA's preemption clause did not reach "self-imposed undertakings," *Wolens* recognized the fundamental importance of private agreements as a means of achieving the ADA's pro-competitive goals:

> The ADA . . . was designed to promote 'maximum reliance on competitive market forces.' [cite omitted] *Market efficiency requires effective means to enforce private agreements.*

513 U.S. at 230 (emphasis added). The Court went on to emphasize the "fundamental" importance that such agreements, "freely made," be enforced. *Id.* (citing *Brief for United States as Amicus Curiae*, at 23, wherein it was stated that "[T]he stability and efficiency of the market depend fundamentally on the enforcement of agreements freely made, based on needs perceived by the contracting parties at the time."). In bringing their tort claims, Petitioners here simply seek such an enforcement and protection of their agreements with United.

Far from interfering with or frustrating any ADA policies and purposes, allowing Petitioners to bring their tort claims against Respondents, under the circumstances presented here, would undeniably *promote* competition, by enforcing and

protecting the private contracts which are so "fundamental" to the "market efficiency" which the ADA was designed to promote. [11]

Notably, the common law torts which Petitioners have brought do not represent an effort by the State to "impos[e its] own substantive standards with respect to rates, routes, or services . . . . " *Wolens*, 513 U.S. at 232. Rather, this dispute simply involves private parties using the judicial process to: (1) enforce and protect the mutual rights and obligations which the contracting parties voluntarily chose to assume; and (2) protect the integrity of those agreements by allowing remedies to be brought against a third party for its intentional efforts to tortiously undermine them. The fact that, by their nature, the *subject matter* of those private agreements happens to concern "routes", is wholly irrelevant to the state and federal deregulation aims of the ADA.

What is at issue here is the manner in which the Respondents conduct their business relations; not the manner in which they conduct their business of transporting passengers. United's liability for breach of its fiduciary duties and its fraudulent inducement is purely a product of its own decision to induce Petitioners to enter into agreements through fraudulent misrepre-

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[11] Indeed, insofar as the traditional common law torts brought by Petitioners certainly did not impair federal regulation *before* the ADA, it is difficult to imagine how those traditional torts could impair deregulation *after* the ADA.

sentations, and then breach the fiduciary duties necessarily created by those agreements. A verdict in favor of Petitioners on these claims will merely admonish United that in the event it chooses to enter into and consummate business agreements, that it must do so without misrepresentations, and in fulfillment of the obligations thus created, in the same manner as is required of any other private or commercial entity.

The same is true for the intentional interference with contract claims brought against SkyWest, which merely represent a traditional common law remedy necessary to preserve the sanctity of Petitioners' pre-existing contractual relationship with United.

In many respects then, this dispute goes to the very heart of the ADA's enactment. That is, in a marketplace freed from excessive governmental regulation, it is essential, in order to avoid both injustice and anarchy, that the "rules of the game," as created by the airlines themselves in their agreements with one another, be enforced and protected. However, the ADA itself has no mechanism for doing so; nor is there any indication that Congress intended these issues to be governed by some manner of federal common law.[12] Rather, as is traditionally the case

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[12] Nor, contrary to Judge Easterbrook's implications, is the Department of Transportation a substitute for the private causes of action which Petitioners have now been denied. There is no private right of action under the FAA (*Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976)) and the DOT may not therefore act to vindicate private rights. *Id.* at 301.

respecting private disagreements, Congress clearly intended that such disputes be resolved, and that such privately-created "rules" be enforced and protected, pursuant to traditional common law remedies.

Moreover, under no circumstances could one imagine that Congress intended to promote "competitive conduct" which has traditionally and universally been considered to be wrongful and tortious, such as intentionally interfering with a valid contractual relationship between two other parties.[13] Indeed, insofar as government regulation of conduct is to be replaced under the ADA with "private regulation" through private contracts and agreements, it is all the more important that the private business dealings between airlines be subject to traditional and enforceable remedies for wrongful and tortious conduct.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that their writ of certiorari be granted.

Moreover, the civil penalty of not more than $10,000 to which the Respondent airlines may be liable under the ADA (49 U.S.C. § 46301(c)), will hardly be a deterrent, considering the literally hundreds of millions of dollars by which Respondents may be unjustly enriched as a result of their tortious conduct as here alleged.

[13] The *Restatement (Second) of Torts* § 768(2) (1977) in fact denies a competitive privilege for inducing breach of an existing contract.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Argued: May 10, 2000
Decided: July 5, 2000
Docket No. 00-1110

UNITED AIRLINES, INC.,
Plaintiff, Counterdefendant-Appellee,

v.

MESA AIRLINES, INC. and WESTAIR COMMUTER AIRLINES, INC.,
Defendants, Counterplaintiffs-Appellants,

v.

SKYWEST AIRLINES, INC.,
Third-Party Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 97 C 4455—Elaine E. Bucklo, Judge.

Before EASTERBROOK, RIPPLE, and ROVNER, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.*

Like other major air carriers, United has entered into code-sharing agreements with regional airlines, which fly smaller planes for shorter distances to less populated destinations. The major carrier permits the commuter carrier to use its service marks and logos for flights to and from its hub airports, and it lists the connecting flights in its computer reservation system under its name, carrier code, and flight numbers, such as "UA 2345" (hence the term "code-share," see 14 C.F.R. § 257(c)). The commuter carrier also receives part of the revenue from through traffic that uses both carriers' facilities. In exchange, the commuter carrier is subject to substantial direction: it tailors its schedules so that they mesh with the major carrier's arrivals and departures at the hub, provides planes appropriate to the traffic generated by the major carrier, and agrees to accept revenue that the major carrier controls. (Contracts set the percentage of through rates that the commuter carrier receives, but the major carrier sets the total fares, and thus determines the commuter carriers' revenues.) Major carriers could use their discretion to make commuter carriers' operations unprofitable, but that would hurt the majors' business by drying up local service and driving passengers to other carriers that provide better connecting flights. Market forces thus constrain the exercise of contractual powers.

Mesa Airlines and WestAir Commuter Airlines, two regional airlines that had code-share arrangements with United, believe that courts as well as markets should constrain the major carriers' conduct. Mesa conducted regional

operations to and from Denver, and WestAir to and from Los Angeles, San Francisco, Portland, and Seattle. Mesa acquired WestAir as a subsidiary in 1992. In 1995 United extended Mesa's contractual term for ten years and to additional cities; at the same time, Mesa purchased a number of planes from United. Mesa believes that by paying (in its view, overpaying) for these aircraft it acquired rights beyond those of other commuter carriers; it contends that United became its "partner" rather than simply the opposite party to an arms'-length contract. Relations soured in June 1997 when United replaced WestAir with SkyWest Airlines on eight routes out of Los Angeles. After WestAir protested, United filed this suit under the diversity jurisdiction seeking a declaratory judgment that the WestAir-United contract permitted United to make these changes. WestAir abandoned its remaining commuter routes in May 1998. Meanwhile Mesa and United reached impasse on financial arrangements at Denver. Mesa contended that United was keeping for itself too much of the revenues on through routes and charging excessively for space and baggage handling services at Denver International Airport, which opened early in 1995. Mesa contends that it began to incur losses of $1 million per month, to which it responded by eliminating service to some local markets. United insisted that Mesa serve all regional markets to which it had exclusive rights under the extended agreement; after Mesa refused, United terminated the agreement in January 1998 and amended its suit by seeking a declaratory judgment that this step, too, was proper, and damages for Mesa's breach.

Mesa and WestAir filed counterclaims against United and added SkyWest as a third-party defendant. They seek damages on four theories. First, Mesa and WestAir contend that United broke its contracts; these claims are mirror images of United's. Second, Mesa and WestAir contend that SkyWest is liable for tortiously interfering with the contract between United and WestAir at Los Angeles. They contend that SkyWest inveigled United to switch regional carriers by offering two gates at Los Angeles International Airport—gates that United coveted, an offer that WestAir could not match. Third, Mesa and WestAir allege that United violated the fiduciary duties that it owed them as their partner. Fourth, Mesa contends that United fraudulently induced it to purchase the airplanes and enter into the extension. Claims 2, 3, and 4 seek punitive as well as compensatory damages. United and SkyWest prevailed on the pleadings after the district court concluded that these three claims are preempted by § 105(a)(1) of the Airline Deregulation Act of 1978. As recodified in 1994, this statute reads:

> Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

49 U.S.C. § 41713(b)(1). State common law counts as an "other provision having the force and effect of law" for purposes of this statute. See *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 233 n. 8, 115 S.Ct. 817, 130 L.Ed.2d 715 (1995); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 388, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992). See also *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 502-03, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996) (plurality opinion), *id.* at 503-05, 116 S.Ct. 2240 (Breyer, J., concurring), *id.*, at 509-12, 116 S.Ct. 2240 (O'Connor, J., concurring in part and dissenting in part) (characterizing tort remedies as regulatory provisions for purposes of preemption clauses in another statute). A broad clause saving common-law remedies might overcome the understanding that judgments in tort suits should be treated like state laws and regulations to the extent they have the same practical effect as laws and regulations, see *Geier v. American Honda Motor Co.*, ____ U.S. ____, ____, 120 S.Ct. 1913, 1918, 146 L.Ed.2d 914 (2000); *cf. Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 249-56, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984); but the savings clause in the Airline Deregulation Act says only that "[a] remedy under this part is in addition to any other remedies provided by law." 49 U.S.C. § 40120(c). This does not carve any domain from the scope of § 105(a)(1). The district court concluded that all three tort claims relate to an air carrier's routes—they concern which carriers fly to which destinations from which airports, and which carriers provide service (and at what rates) on through or joint routes—and therefore are preempted. See *Travel All Over the World, Inc. v. Saudi Arabia*, 73 F.3d 1423, 1430-

35 (7th Cir. 1996). The district judge certified the order for interlocutory appeal under 28 U.S.C. § 1292(b). We agreed to hear the appeal; proceedings on both sides' contract claims (which under *Wolens* are not preempted) have stalled pending its resolution.

One line of argument might have been that although the *claims* at issue may be "related to a . . . route . . . of an air carrier" in interstate commerce, Mesa and WestAir do not rely on any "*law, regulation, or other provision having the force and effect of law* related to a . . . route . . . of an air carrier" (emphasis added). Section 105(a)(1) might have been read to limit preemption to a law, regulation, or common law doctrine directed to the air transportation industry, as in *Morales*, which held that § 105(a)(1) precludes efforts by state attorneys general to promulgate a special code of conduct for advertisements by air carriers. On this understanding, laws of general applicability would not be preempted just because the subject of a particular case was air transportation. Tort law is not industry-specific; Mesa and WestAir want to use the same principles that apply to disputes about computer software, see *J.D. Edwards & Co. v. Podany*, 168 F.3d 1020 (7th Cir. 1999) (Illinois law), and employment, see *Farr v. Gruber*, 950 F.2d 399 (7th Cir. 1991) (Wisconsin law). *Wolens* read § 105(a)(1) more broadly, however. Participants in a carrier's frequent flyer program filed suit when the carrier changed the program's rules. One claim arose under a state's consumer fraud act, a statute of general applicability. Nonetheless, the Court held, § 105(a)(1) preempts application of

that law to frequent flyer programs, which affect rates because they are discounts. 513 U.S. at 226-28, 115 S.Ct. 817.

Because *Wolens* held general consumer-fraud law preempted, Mesa and WestAir have a big problem. One solution, as they see it, lies in recent decisions under ERISA, which preempts state laws that "relate to" its subject. Both *Morales* and *Wolens* relied on doctrine developed under ERISA, and at the time the Court's opinions tended to read the ERISA language broadly. E.g., *Morales*, 504 U.S. at 383-84, 112 S.Ct. 2031, relying on *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983). Times have changed for pension and welfare plans. More recent decisions hold that state laws of general applicability are not preempted just because they have economic effects on pension or welfare plans. See, e.g., *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995); *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, 519 U.S. 316, 117 S.Ct. 832, 136 L.Ed.2d 791 (1997); *De Buono v. NYSA-ILA Medical and Clinical Services Fund*, 520 U.S. 806, 117 S.Ct. 1747, 138 L.Ed.2d 21 (1997). Mesa and WestAir ask us to follow this approach and curtail the preemptive effect of § 105(a)(1) accordingly. But if developments in pension law have undercut holdings in air-transportation law, it is for the Supreme Court itself to make the adjustment. Our marching orders are clear: follow decisions until the Supreme Court overrules them. *State*

Oil Co. v. Khan, 522 U.S. 3, 20, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989).

Opinions such as *Taj Mahal Travel, Inc. v. Delta Airlines Inc.*, 164 F.3d 186, 195 (3d Cir. 1998), which say that state law is preempted by § 105(a)(1) only if it "frustrate[s] Congressional intent [or] impose[s] a state utility-like regulation on the airlines", cannot be reconciled with *Wolens* (the general anti-fraud statute held preempted there was a long distance from "utility-like regulation"), and we doubt that this position could be justified by the latest ERISA cases, even if we were free (which we are not) to prefer decisions such as *De Buono* and *Dillingham* over *Wolens* and *Morales*. One subject of *UNUM Life Insurance Co. v. Ward*, 526 U.S. 358, 119 S.Ct. 1380, 143 L.Ed.2d 462 (1999), the Court's most recent encounter with preemption under ERISA, was whether a general doctrine of state agency law could be used to override the express terms of a welfare-benefit plan. The Court answered "no," see 526 U.S. at 377-79, 119 S.Ct. 1380, and this conclusion, like *Wolens*, necessarily means that a claim under, or application of, state law may be preempted as related to the federal topic, even though the rule in question does not single out pension or welfare plans – or air carriers' rates, routes, or services. Our opinion in *Travel All Over the World* used the approach established by *Wolens* and *Morales*, concluding that a claim is preempted if *either* the state rule expressly refers to air carriers' rates, routes, or services, or application of the state's rule would have "a

significant economic effect upon them" (73 F.3d at 1432); nothing any other circuit has said about the subject persuades us to alter course.

The possibility that recent ERISA decisions would lead us to abandon *Travel All Over the World* and follow *Taj Mahal Travel* (which declined to follow this circuit's position, see 164 F.3d at 193-95) is what induced the district court to certify its order for interlocutory appeal. But an appeal under § 1292(b) brings up the whole certified order, *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 204-05, 116 S.Ct. 619, 133 L.Ed.2d 578 (1996); *Edwardsville National Bank & Trust Co. v. Marion Laboratories, Inc.*, 808 F.2d 648, 650-51 (7th Cir. 1987), rather than just the legal issue that led to certification. Thus we must tackle the regional carriers' contention that their claims are sound, despite *Travel All Over the World*, for the same reason the Supreme Court held in *Wolens* that contract claims are not preempted: § 105(a)(1) is designed to replace regulation with voluntary agreements, see 513 U.S. at 228-35, 115 S.Ct. 817, and the fact that states sometimes apply the label "tort" to common-law doctrines that implement private agreements cannot doom their claims, the carriers insist. This is unimpeachable as a principle, but does it save these carriers' claims? *Wolens* tells us to distinguish

> between what the State dictates and what the airline itself undertakes [, which] confines courts . . . to the parties' bargain, with no enlargement

> or enhancement based on state laws or policies external to the agreement.

513 U.S. at 233 (footnote omitted). It is awfully hard to understand the regional carriers' claims as efforts to enforce "the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement."

Let us start with Mesa's contention that its purchase of aircraft, and the extension of its code-sharing agreement with United at Denver, are the result of fraudulent inducement. This is not by any stretch of the imagination a request to enforce the parties' bargains; it is a plea for the court to replace those bargains with something else. Doubtless the institution of contract depends on truthfulness; the staunchest defenders of private institutions and limited government believe that public bodies must enforce rules against force and fraud. E.g., Richard A. Epstein, *Principles for a Free Society* 82-85 (1998). When all a state does is use these rules to determine whether agreement was reached, or whether instead one party acted under duress, it transgresses no federal rule. But when the state begins to change the parties' financial arrangements, as Mesa demands, it is supplying external norms, a process that the national government has reserved to itself in the air transportation business. Mesa does not want to cancel the agreement and restore the *status quo* as of 1994. It wants damages. *Wolens* held that § 105(a)(1) preempts state anti-fraud statutes as applied to air carriers' rates, routes, and services, 513 U.S. at 227-28, 115 S.Ct. 817; just

so with common-law rules against fraudulent inducement, which differs from a contention that one party knuckled under to a show of force by the other. And as in *Wolens* this conclusion does not leave regional air carriers at the mercy of unscrupulous major carriers (or the reverse); the Secretary of Transportation has been charged with investigating claims of deceit in the air transportation business and has the power to issue remedial orders (including monetary penalties) against air carriers that resort to fraudulent practices. 49 U.S.C. §§ 41712, 46301; *Wolens*, 513 U.S. at 228 n. 4, 115 S.Ct. 817; Morales, 504 U.S. at 379, 390-91, 112 S.Ct. 2031.

Next consider the contention of both Mesa and WestAir that fiduciary principles drawn from partnership law should be applied. Partnership is contractual; partners can and do specify their relations in detail, and the norms of partnership law are just background rules that cover a subject when contracts do not. In this sense partnership and fiduciary rules are a part of contract law, cf. John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 Yale L.J. 625 (1995). But Mesa and WestAir assert that the law of partnerships imposes on United duties that *override* the contract. For example, United contends that its contracts permit it to regulate the destinations and flight frequency of the code-share regional carriers; Mesa and WestAir deny this, and if they are right then they will prevail under their contracts. But they contend (under their partnership theory) that they prevail *even if* United had the contractual power

to do what it did. According to Mesa and WestAir, United had a fiduciary obligation to use its contractual powers for *their* economic benefit, rather than for its own, and that they are entitled to punitive damages because (in the language of their brief) United attempted "to terminate Mesa's rights and interests in the Partner Agreement for its own benefit and to Mesa's detriment". Illinois permits one party to a contract to use for its own benefit the rights and powers it has negotiated. See *L.A.P.D., Inc. v. General Electric Corp.*, 132 F.3d 402 (7th Cir. 1997); *Echo, Inc. v. Whitson Co.*, 121 F.3d 1099 (7th Cir. 1997); *Digital Equipment Corp. v. Uniq Digital Technologies, Inc.*, 73 F.3d 756 (7th Cir. 1996); *Industrial Representatives, Inc. v. CP Clare Corp.*, 74 F.3d 128 (7th Cir. 1996); *Continental Bank, N.A. v. Everett*, 964 F.2d 701 (7th Cir. 1992); *Jespersen v. Minnesota Mining & Mfg. Co.*, 183 Ill.2d 290, 233 Ill.Dec. 306, 700 N.E.2d 1014 (1998); *Hentze v. Unverfehrt*, 237 Ill.App.3d 606, 610-11, 178 Ill.Dec. 280, 604 N.E.2d 536, 539 (1992). Only rules external to the parties' bargain could defeat this, but § 105(a)(1) in turn defeats external rules. (We are skeptical that the word "partner" on the cover sheet of a complex contract that characterizes the regional carriers as "independent contractors" would bring the law of partnership into play in the first place. Businesses often refer to suppliers, customers, and producers of complementary products colloquially as "our partners" without summoning up fiduciary duties. See *Vaughn v. General Foods Corp.*, 797 F.2d 1403 (7th Cir. 1986). A consumer who sees the advertising slogan "Partners in Progress" would not assume that he

had become a "partner" of the producer, which then must set prices for the consumer's benefit. But we need not pursue this point, given § 105(a)(1).)

Finally, consider the claim that SkyWest tortiously interfered with the contract WestAir had with United. Here, too, Mesa and WestAir rely on principles outside the parties' agreements – for they have reached no agreement at all with SkyWest. Why can't SkyWest offer United gates at Los Angeles International Airport in exchange for some code-share business at LAX? That question can't be answered by reference to a contract between SkyWest and any other party to the case. Even the appearance of a link between the claim against SkyWest and the contract claim against United may be illusory, because most states (including Illinois) treat as tortious some interferences with prospective economic advantage, even if the interference does not cause anyone to break a promise. Suppose, for example, that United's contract with WestAir contained a clause entitling United to end the business relation for any or no reason. Then WestAir could not sue United—but it still could prevail in tort against SkyWest, if the sort of inducement SkyWest offered, or the motive for SkyWest's action, ran afoul of a state's public policy. See, e.g., *J.D. Edwards*, *supra*; *Jeppesen v. Rust*, 8 F.3d 1235 (7th Cir. 1993); *Poulos v. Lutheran Social Services of Illinois, Inc.*, 312 Ill.App.3d 731, 245 Ill.Dec. 465, 728 N.E.2d 547 (2000); *Strosberg v. Brauvin Realty Services, Inc.*, 295 Ill.App.3d 17, 33, 229 Ill.Dec. 361, 691 N.E.2d 834, 845 (1998); *Reuben H. Donnelley*

Corp. v. Brauer, 275 Ill.App.3d 300, 312-13, 211 Ill.Dec. 779, 655 N.E.2d 1162, 1172 (1995). No surprise, then, that courts regularly treat claims of tortious interference with contract (or interference with economic advantage) as preempted in labor law, given how readily these claims may be used to get around contracts (or limits on the means of enforcing contracts). See, e.g., *Lingle v. Norge Division of Magic Chef, Inc.*, 823 F.2d 1031, 1047, 1049 (7th Cir. 1987) (en banc), reversed on other grounds, 486 U.S. 399, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988); *Kimbro v. Pepsico, Inc.*, 215 F.3d 723 (7th Cir. 2000). Likewise they are preempted when they would have a significant effect on air carriers' rates, routes, or services—as these claims, which are all about WestAir's (and SkyWest's) routes and divisions of revenues, assuredly do whether or not they would lead to punitive damages. Cf. *Speakers of Sport, Inc. v. ProServ, Inc.*, 178 F.3d 862 (7th Cir. 1999) (illustrating how the tort of interference with economic advantage may be used to suppress competition, which would undercut the Airline Deregulation Act of 1978).

Mesa and WestAir protest that none of their claims offends the goals and policies that Congress likely aimed at in 1978. One could have said the same (indeed, Justice Stevens *did* say the same) about the regulations and statutes held preempted in *Morales* and *Wolens*. But Justice Stevens was in dissent; the majority concluded that the statute applies according to its text, rather than according to goals and motives imputed to legislators. For what it may be worth, however, we are inclined to think that allowing

these claims to proceed *could* gum up the works. Mesa offered service to multiple states from Denver, service United used to construct through rates and routes for travel across many jurisdictions. So too for regional service out of Los Angeles, which reached Oregon and Washington, and affected through travel to and from other states and nations. Yet Mesa and WestAir want us to hold that the tort law of Illinois determines (for example) what inducements SkyWest may offer United to reassign routes among regional carriers in the southwest, and how much Mesa should receive for its portion of through rates on service from Miami through Denver to Jackson, Wyoming. Illinois is United's headquarters, and the parties agreed that their contracts would be interpreted under Illinois law, but as a source of tort law Illinois has no plausible claim—and for that matter no other state has much of a claim either. Basic rules for inter-carrier transactions may come from voluntary agreements or from the Department of Transportation; applying the conflicting tort principles of 50 different states to these interstate and international transactions would make a mess of things. Preemption under § 105(a)(1) enables a system of private law, with nationally uniform overrides, to flourish.

AFFIRMED

APPENDIX B

United States District Court, N.D. Illinois, Eastern Division.

No. 97 C 4455.

Oct. 5, 1999.

BUCKLO, District J.

In my order of August 6, 1999, I granted judgment on the pleadings in favor of United on Mesa and Westair's claims for fraud and breach of fiduciary duty and in favor of Skywest on Mesa and Westair's claims for intentional interference with contractual relations. I reasoned that the Seventh Circuit has held that "tort claims that refer to or have a connection with rates, routes, or services [are] preempted by the [Airline Deregulation Act, 49 U.S.C. § 41713(b)(1)(ADA)]." *Travel All Over the World v. Saudi Arabia*, 73 F.3d 1423, 1433 (7th Cir. 1996) ("*Travel All*"). Fraud, breach of fiduciary duty, and intentional interference with contractual relationships are all causes of action which sound in tort, and because the tort claims of these parties relate to routes of a carrier, I held them to be preempted by the ADA.

The claims of United and several counterclaims remain, so there is no final judgment entitling any party to appeal this ruling. Mesa and Westair move for certification under 28 U.S.C. § 1292(b) on the grounds that the ruling involves a controlling question of law as to which

there is substantial ground for difference of opinion and that immediate appeal will materially advance the ultimate termination of the litigation. Certification is an "exceptional" procedure, *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978). The parties seeking it bear a heavy burden. However, the Third and the Tenth Circuits have certified preemption rulings with regard to the provision in question. See *Abdullah v. American Airlines*, 181 F.3d 363 (3rd Cir. 1999); *Cleveland v. Piper Aircraft Co.*, 985 F.2d 1438 (10th Cir. 1993).

Although it is a close issue, I hold that the burden is satisfied here. The preemption question is a pure question of law and not an issue of fact. It is a "controlling" question of law, one the resolution of which "is quite likely to affect the further course of litigation, even if not certain to do so." *Sokaogon Gaming Enterp. v. Tushie-Montgomery Assoc.*, 86 F.3d 656, 659 (7th Cir. 1996). If the tort claims can be disposed by preemption the litigation will be considerably simplified and so quite likely affected; likewise if they cannot, they can be litigated now instead of relitigated on later appeal. In any case the course of further litigation would be substantially affected.

The close issue arises in considering whether there are substantial grounds for difference of opinion regarding the preemption question in this case. On the one hand, I think the statutory language mandates the disposition of the tort claims I have made. On the other hand, I acknowledge the force the arguments

that: (1) the Supreme Court and the Seventh Circuit have not ruled on that the particular torts in dispute in this case are preempted by the ADA; (2) the preemption of tort claims by statutes that clearly preempt some such claims (such as the NLRA) is a vexed question, see, e.g., *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213 (1985) (NLRA context); (3) only a small handful of cases deal with the issue, perhaps insufficient to regard the matter as settled, and (4) the Third Circuit has recently raised doubts about the Seventh Circuit's conclusion, see *Taj Mahal Travel, Inc. v. Delta Airlines Inc.*, 164 F.3d 186, 193 (3rd Cir. 1998). Since reasonable minds might differ with my view, although of course they would be wrong, I conclude that there are substantial grounds for a difference of opinion.

Finally, there is the issue of whether the appeal may materially advance the ultimate termination of the litigation. In this case, affirmance would mean that the tort claims, and one of the parties (Skywest) would be out of the case. Reversal and remand would restore the tort claims and enable their resolution in these proceedings.

I therefore grant the motion for certification, finding that the ruling involves a controlling question of law as to which there is substantial ground for difference of opinion and that immediate appeal will materially advance the ultimate termination of the litigation.

ENTER ORDER:

/s/ Elaine E. Bucklo
U. S. District Judge

Dated: October 4, 1999

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Case Number: 1:97-cv-04455
Title: United AL v. Mesa AL Inc
Assigned Judge: Honorable Elaine E. Bucklo

MINUTE ORDER of 8/6/99 by Hon. Elaine E. Bucklo: Plaintiff's motion for judgment on the pleadings for count VII and Count VIII of Mesa Airlines, Inc.'s counterclaims and count III of Westair Commuter Airlines, Inc.'s counterclaims [54-1] and Skywest Airlines' motion for judgment on Mesa Airlines' and West Air Commuter Airlines' third-party complaint against it are granted [51-1]. (See reverse of minute order.) Mailed notice.

This docket entry was made by the Clerk on August 10, 1999.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Case Number: 1:97-cv-04455
Title: United AL v. Mesa AL Inc
Assigned Judge: Honorable Elaine E. Bucklo

MINUTE ORDER of 10/4/99 by Hon. Elaine E. Bucklo: The motion of Mesa Airlines and Westair Commuter Airlines for certification of court's order of 08/06/99 54(b); 28 U.S.C. [section 1292(b)] is granted [80-1] with respect to the claims against both Skywest Airlines and United Airlines. (See reverse of minute order.) Mailed notice.

This docket entry was made by the clerk on October 5, 1999.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 15, 1999

By the Court:

MESA AIRLINES, INCORPORATED and WESTAIR COMMUTER AIRLINES, INCORPORATED, Petitioners,	)	Petition for Permission to Appeal Pursuant to 28 U.S.C. 1292(b) Northern District of Illinois, Eastern Division. 97 C 4455 Elaine E. Bucklo, Judge.
v.	)	
No. 99-8038	)	
UNITED AIRLINES, INCORPORATED, Respondent.	)	

Upon consideration of the **PETITION FOR LEAVE TO APPEAL OF DEFENDANTS, COUNTER-PLAINTIFFS AND THIRD-PARTY PLAINTIFFS, MESA AIRLINES, INC. AND WESTAIR COMMUTER AIRLINES, INC.,** filed October 13, 1999, by counsel,

IT IS ORDERED that the respondent **RESPOND** to the petition by October 29, 1999.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

December 16, 1999

Before

Hon. JOHN L. COFFEY, Circuit Judge

Hon. DANIEL A. MANION, Circuit Judge

Hon. DIANE P. WOOD, Circuit Judge

MESA AIRLINES, INCORPORATED and WESTAIR COMMUTER AIRLINES, INC., Petitioners,	)	Petition for Permission to Appeal Pursuant to 28 U.S.C. 1292(b) Northern District of Illinois, Eastern Division.
v.	)	
No. 99-8038	)	Elaine E. Bucklo, Judge.
UNITED AIRLINES, INCORPORATED, Respondent.	)	

The following is before the court:

1. **PETITION FOR LEAVE TO APPEAL OF DEFENDANTS, COUNTER PLAINTIFFS AND THIRD-PARTY PLAINTIFFS, MESA AIRLINES, INC. AND COMMUTER AIRLINES, INC. [28 U.S.C. § 1292(b)]**, filed

on October 13, 1999, by counsel for the petitioners.

2. **RESPONSE OF UNITED AIRLINES, INC. AND SKYWEST AIRLINES, INC. IN OPPOSITION TO DEFENDANTS' PETITION FOR PERMISSION TO APPEAL PURSUANT TO 28 U.S.C. § 1292(b)**, filed on October 29, 1999, by counsel for respondent.

IT IS ORDERED that the Petition for Leave to Appeal is **GRANTED**. Petitioners shall pay the required appellate fees to the clerk of the district court within ten days from the entry of this order pursuant to Fed.R.App.P. 5(d)(1). Once the district court notifies this court that the fees have been paid, the appeal will be entered on this court's general docket.

IT IS FURTHER ORDERED that briefing in the appeal from appeal no. 99-8038 will proceed as follows:

1. The brief and required short appendix of petitioners are due January 26, 2000.

2. The brief of the respondent is due February 25, 2000.

3. The reply brief of the petitioners, if any, is due March 10, 2000.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

NOTICE OF ORAL ARGUMENT

Date: March 27, 2000
By the court:
No. 00-1100
UNITED AIRLINES, INCORPORATED,
Plaintiff – Appellee

v.

MESA AIRLINES, INCORPORATED and WESTAIR COMMUTER AIRLINES, INCORPORATED,
Defendants – Appellants

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 97 C 4455, Elaine E. Bucklo, Judge

IT IS ORDERED that this case be set down for oral argument on Wednesday, May 10, 2000, in the Courtroom of the United States Court of Appeals for the Seventh Circuit, 219 South Dearborn, Room 2721, Chicago, Illinois at 9:30 a.m.

Oral argument will be no more than 15 minutes for each side. Counsel are advised that the panel of judges assigned to oral argument may decide, after reading the briefs, that less time is required for oral argument.

Copies of this notice have been sent to counsel of record.